Office-Supreme Court, U.S.
FILED
FEB 2 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM C. CAIN,

Petitioner,

vs.

MEDTRONIC, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF THE PETITIONER

ANTHONY J. MURRAY, JR.*
THOMAS P. VALENTI
30 North LaSalle Street
Suite 2626
Chicago, Illinois 60602
(312) 236-8877, 236-1860

GEORGE C. PONTIKES
11 South LaSalle Street
Suite 600
Chicago, Illinois 60603
(312) 782-2610

Attorneys for Petitioner
WILLIAM C. CAIN

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

(1) Is it contrary to public policy to enforce a restrictive covenant so as to prohibit a pacemaker salesman from assisting in implant surgery, even though his assistance has been specifically requested by a cardiologist or surgeon?

(2) Does such a prohibition violate a patient's right to receive medical care in accordance with his physician's best judgment and the physician's right to administer it, as guaranteed by the Fifth and Ninth Amendments to the United States Constitution? (*Doe v. Bolton*, 410 U.S. 179, 197 [1973]).

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

ARGUMENT:

I.

A Federal Question Is Presented In That The Enforcement Of The Covenant Violates The Constitutional Rights Of Physicians And Patients, And Is Consequently Against Public Policy 2

II.

The Constitutional Rights Involved Herein Are Protected By The Fifth And The Ninth Amendments To The United States Constitution 5

APPENDIX A:

1. Dr. Kehoe's Testimony 1a
2. Medical Emergencies 2a

TABLE OF AUTHORITIES

CITATIONS:	PAGE
American Medical Assn. v. Weinberger, 522 F.2d 921 (7th Cir. 1975)	2, 3, 4
Canfield v. Spear, 44 Ill. 2d 49, 254 N.E.2d 433 (1969)	4
Cockerill v. Wilson, 51 Ill. 2d 179, 281 N.E.2d 648 (1972)	4, 5
Doe v. Bolton, 410 U.S. 179 (1973)	3, 4, 5
Griswold v. Connecticut, 381 U.S. 479 (1965)	5
Machlett Laboratories, Inc. v. Techny Industries, 655 F.2d 795 (7th Cir. 1981)	2
Medtronic, Inc. v. Gibbons, 527 F. Supp. 1085 (D. Minn. 1981)	4, 5
Roe v. Wade, 410 U.S. 113 (1973)	6
United States v. Oregon Medical Society, 343 U.S. 326 (1952)	7

CONSTITUTIONAL PROVISIONS:	
Amendment V	5
Amendment IX	5
Amendment XIV	5, 6

STATUTES:	
42 U.S.C. § 1395	4

In The

Supreme Court of the United States

October Term, 1982

WILLIAM C. CAIN,

Petitioner,

vs.

MEDTRONIC, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF THE PETITIONER

ARGUMENT

I.

A FEDERAL QUESTION IS PRESENTED IN THAT THE ENFORCEMENT OF THE COVENANT VIOLATES THE CONSTITUTIONAL RIGHTS OF PHYSICIANS AND PATIENTS, AND IS CONSEQUENTLY AGAINST PUBLIC POLICY.

The Respondent asserts that whether public policy is violated by the covenant in question does not present a federal question (Response, p. 5). However, whether a restrictive covenant violates public policy is always of paramount concern for a federal court in determining if such a covenant should be enforced by injunctive relief. *Machlett Laboratories, Inc. v. Techny Industries*, 665 F.2d 795, 797 (7th Cir., 1981). Indeed, this is the case whenever an injunction is sought, and particularly when rights involved in the doctor-patient relationship are concerned. See *American Medical Assn. v. Weinberger*, 522 F.2d 921, 925, 926 (7th Cir., 1975). Even the Court of Appeals herein had to weigh this consideration (App. 6a-8a).

It is the Petitioner's contention that the enforcement of the covenant interferes with the constitutional rights of physicians and patients concerning the administering of medical care. If the Petitioner's contention is correct, then, clearly, a federal question is involved. Concomitantly, if the covenant's enforcement violated the constitutional rights of physicians and patients, it seems only logical to conclude that such enforcement also violated public policy. Thus, the key issue presented for review is whether the physicians' and the patients' constitutional rights were violated by the District Court's enforcement of the covenant.

It is established that a physician has a constitutional right to administer medical care to his patient in accordance with his best medical judgment, and that his patient has an accompanying constitutional right to receive such care. *Doe v. Bolton*, 410 U.S. 179, 197 (1973) and *American Medical Assn. v. Weinberger*, 522 F.2d 921, 925 (7th Cir., 1975). The Respondent does not dispute the validity of this proposition. Given this proposition, it follows that if some decision is considered to be part of a physician's administering of medical care that decision belongs to the physician, and is within his constitutionally protected realm.

The issue in this case is whether the physician's selection of a salesman on whom to rely for assistance, before, during, and after implant surgery is within the realm of a medical decision. If it is, it is constitutionally protected and cannot be interfered with by an injunction enforcing a restrictive covenant. For, enforcement of the covenant would violate the constitutional rights of physicians and patients, and, consequently, be contrary to public policy.

It would seem obvious from the testimony in this case that the physician's selection of a salesman for the above tasks is a medical decision, if only from the fact that it is made by the physician himself as part of his patient care. Both Dr. Kehoe and Dr. Carney considered such a selection an important one for a physician to make. Indeed, Dr. Carney termed it a critical part of patient care (Tr. 660). As such, the decision is clearly an exercise of the physician's medical judgment. Thus, it comes within the constitutionally protected area of the physician-patient relationship as enunciated by this Court in *Doe v. Bolton*, *supra*.

The Respondent concedes the validity of the principle, enunciated in *Doe v. Bolton* and *American Medical Assn. v. Weinberger*, that direct restraints on a physician's medical judgments are prohibited. However, the Respondent argues that such "... is not the case here" (Response, p. 6). Yet, here, by virtue of court order a physician is prohibited from consulting with the pacemaker technician he thinks is most qualified to advise him concerning his patients' pacing problems. Furthermore, the physician is prohibited from having the technician, he deems most qualified, assist him in implant surgery. If these are not direct restraints on a physician's medical judgments, then what are?

If the restraints were effected by a federal officer or employee they would clearly be prohibited by the provisions of 42 U.S.C. § 1395 which specifies in relevant part:

> "Nothing in this subchapter shall be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided, ..."

Yet, here, a federal judge is doing that which is clearly probibited to other federal employees. This injunction constitutes a direct interference "... with a function and duty traditionally reserved to qualified medical professionals". (See *American Medical Assn. v. Weinberger, supra*, at 925).

In its response, pp. 6, 7, the Respondent cites the following cases in support of its opposition to the petition, *Medtronic, Inc. v. Gibbons*, 527 F. Supp. 1085 (D. Minn. 1981), *Canfield v. Spear*, 44 Ill. 2d 49, 254 N.E.2d 433 (1969), and *Cockerill v. Wilson*, 51 Ill.2d 179, 281 N.E.2d 648 (1972). Yet, none of these cases dealt with the con-

stitutional and public policy issues raised here.[1] The decision in *Gibbons* has already been discussed in the petition herein at p. 21.

Insofar as *Canfield* and *Cockerill* are concerned it is interesting to note that in each case a doctor was prohibited from establishing his practice within a 20-25 mile radius of the respective cities. Those cases did not prohibit the doctors from continuing to treat their patients outside the prohibited boundaries. Whereas, in this case all business contact between the salesmen and the prohibited doctors was banned, regardless of where it occurred. Unlike the decisions in *Canfield* and *Cockerill*, and those in virtually all other restrictive covenant cases, there were no geographic limits to the covenant.

II.

THE CONSTITUTIONAL RIGHTS INVOLVED HEREIN ARE PROTECTED BY THE FIFTH AND THE NINTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Respondent also notes that this case does not involve any state action and thus no claimed violation of a Fourteenth Amendment right is involved (Response, p. 6). However, the constitutional rights involved in the physician-patient relationship flow from the right to liberty and the right to privacy as guaranteed by the Fifth and the Ninth Amendments to the Constitution. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) and the concurring opinion of Justice Goldberg therein at 486,

[1] *Canfield* and *Cockerill* were decided before this Court's historic decision in *Doe v. Bolton*, *supra*, which discussed at length the constitutional rights involved in the physician-patient relationship.

491, 492; *Roe v. Wade*, 410 U.S. 113, 152, 153 (1973). In *American Medical Assn. v. Weinberger, supra*, at 925 the Court acknowledged that the constitutional rights involved in the physician-patient relationship do not reside solely in the Fourteenth Amendment. The Court there was concerned as to whether those rights would be infringed by proposed H.E.W. regulations. In that case, as here, there was no state action involved.[2]

Finally, the Respondent proposes two extremely vague hypothetical situations, arguing that neither of them would become federal matters (Response, p. 6). In view of their vagueness, it is impossible to tell. But the fact situation here is very concrete, and poses a novel but very real question as to whether federal constitutional rights have been infringed and public policy violated. Also, in view of the high technology nature of the pacemaker industry, this case is a harbinger of those to come.

The union of medicine and high technology is here. The recent implant of an artificial heart into Barney Clark has made that point dramatically. Are restrictive covenants going to be allowed to deprive surgeons of technical assistance they want and need in surgery? Is a pacemaker company's desire to protect its market share to take precedence over a surgeon's desire to provide his

---

[2] It should also be noted that the petitioner proposed an additional basis for review by this Court, namely, that the Court of Appeals' decision is based on findings of fact which it made in place of any from the district court (Petition, pp. 19-22). This action by the Court of Appeals violates the Federal Rules of Civil Procedure and the principles enunciated by this Court in a number of decisions (Petition, p. 20). The Respondent did not comment on this argument.

patient with the best technical assistance available?[3] This case presents very important constitutional and public policy issues. A decision by this Court setting forth the constitutional principles applicable in such situations will affect the type of health care provided hundreds of thousands of future pacemaker patients. Furthermore, it could well affect the application of restrictive covenants in other areas of medicine as well.

The Petitioner believes that as a matter of constitutional right and public policy the physician should be free to use the technician he thinks is best qualified to assist him. After all, his patient's life is at stake and he wants to have the best pacemaker technician he knows of assist him in surgery now. It does today's patient no good to have the best technician available to him in twelve months. His heart is malfunctioning now. He needs a pacemaker implant now. And would any patient want less than the best surgeon and the best technician to assist in his implant operation? A patient would not take kindly to the view that a restrictive covenant should be allowed to prevent his doctor from having the best technician available assist in his surgery.

Medtronic has long argued that it must enforce the covenant in order to protect its share of the pacemaker market. However, concerns of far greater import than market share are at work here. As this Court stated in *United States v. Oregon Medical Society*, 343 U.S. 326, 336 (1952), ". . . there are ethical considerations where the historic direct relationship between patient and

---

[3] It seems strange that a pacemaker company should be held to possess a proprietary interest in various physicians so as to interfere in their practice of medicine.

physician is involved which are quite different than the usual considerations prevailing in ordinary commercial matters".

The covenant deprives physicians of the right to consult with the pacemaker technician on whom they have come to rely for advice in a complex area. Furthermore, the covenant deprives physicians of the technician they think is best qualified to assist them in implant surgery. As such, the covenant violates a patient's right to receive medical care in accordance with his physician's best judgment and the physician's right to administer it. The covenant is an unconstitutional interference in the practice of medicine. Thus, its enforcement is contrary to public policy.

Respectfully submitted,

ANTHONY J. MURRAY, JR.*
THOMAS P. VALENTI
30 North LaSalle Street
Suite 2626
Chicago, Illinois 60602
(312) 236-8877, 236-1860

GEORGE C. PONTIKES
11 South LaSalle Street
Suite 600
Chicago, Illinois 60603
(312) 782-2610

Attorneys for Petitioner
WILLIAM C. CAIN

* Counsel of Record

APPENDIX A

1. *Dr. Kehoe's Testimony.* In its Response, p. 4, the Respondent states as follows:

> "Dr. Kehoe, called as a witness by petitioner, specifically refused to say that the quality of patient care would suffer if he did not have a particular sales representative. All he would say is that his life would be 'easier' if he were dealing with someone he was used to."

However, a review of the record reveals that Dr. Kehoe was prevented from answering the question by virtue of the Court's interjecting another.

> "Q. (Mr. Valenti) One final question: Do you think that the patient welfare and quality of care that you are able to deliver will suffer if William Cain is prohibited from contacting you within the next 360 days or any portion thereof?
>
> "A. Well, I think—it is difficult for me to answer that but I will say that the—
>
> "THE COURT: You would prefer to have him available, right?
>
> "THE WITNESS: My life would be made a great deal easier if he was available to me and if I didn't really have to resort to communicating or dealing with people in whom I may have a lower level of confidence." (Tr. 547)

Besides, Dr. Kehoe's testimony makes it clear that he thought the quality of medical care was adversely affected by enforcement of the covenant (Tr. 544-547).

Despite Dr. Kehoe's plea the District Judge went ahead and enforced the covenant, thereby making Dr. Kehoe's life a great deal harder. That is why the covenant is wrong. Any covenant which makes a physician's practice

a great deal harder is an unwarranted interference in the practice of medicine and is against public policy.

2. *Medical Emergencies.* In the Respondent's view public policy objections are met by virtue of the fact that medical emergencies were excluded from the district court's proscription (App. 23a and Response, p. 5). However, this provision has proved to be of dubious value. The Petitioner attended three emergency surgeries while the preliminary injunction was in effect and reported them to the Respondent pursuant to the court's direction (Tr. 672). In its March 16, 1982 contempt petition the Respondent charged that the Petitioner's attendance at the three surgeries was in violation of the preliminary injunction (see the Petition herein, p. 12).